INDEX

PAGE

Opinion Below 1

Jurisdiction 1

Questions Presented 2

Statement 2

Argument:

I. The Supreme Court of South Carolina did not err in holding that the trial judge did not abuse his discretion, to the effect that Petitioner was denied the assistance of counsel and due process of law, in refusing Petitioner's motion for a continuance 4

II. When, pursuant to the provisions of Section 26-301 *et seq.* of the Code of Laws of South Carolina (1962), an out-of-state witness has been made available and cross-examined at trial, a defendant is not denied his right of confrontation either by the trial court's failure to order the witness, who has been excused without objection, to reappear or by its failure to receive in evidence said witness' testimony at a former trial 9

Conclusion 12

CITATIONS

Cases: PAGE

Avery v. Alabama, 308 U. S. 444, 60 S. Ct. 321, 84 L. Ed. 377 (1940) 4

Barber v. Page, 390 U. S. 719, 88 S. Ct. 1318, 20 L. Ed. 255 (1968) 11

Gaicalone v. Lucas, 445 F. (2d) 1238 (6th Cir. 1971) .. 8

Illinois v. Allen, 397 U. S. 337, 90 S. Ct. 1057, 25 L. Ed. (2d) 353 (1973) 11

Majeske v. United States, 255 F. (2d) 947 (9th Cir. 1959) 7

Mancusi v. Stubbs, 408 U. S. 204, 92 S. Ct. 2308, 33 L. Ed. 292 (1972) 11

Noble v. State, 497 P. (2d) 452 (Okla. Cr. 1972). 6

People v. Pickett, 339 Mich. 294, 63 N. W. (2d) 681 (1954) 10

Piassick v. United States, 252 F. (2d) 658 (5th Cir. 1958) 11

State v. Edwards, 86 S. C. 215, 68 S. E. 524 (1910) ... 6

State v. Hunter, 79 S. C. 84, 60 S. E. 241 (1908) 6

State v. Murphy, 48 S. C. 1, 25 S. E. 43 (1896) 10

State v. Peters, 255 S. C. 375, 179 S. E. (2d) 19 (1971) 6

State v. Rasor, 168 S. C. 221 167 S. E. 396 (1933) 10

State v. Smoak, 142 S. C. 37, 140 S. C. 251 (1927) 6

State v. Spencer, 177 S. C. 346, 181 S. E. 217 (1935) .. 6

Ungar v. Sarafite, 376 U. S. 275, 84 S. Ct. 841, 11 L. Ed. (2d) 921 (1964) 4, 9

CITATIONS—Continued

Cases: PAGE

State Statutes:

Section 26-301 *et seq.*, Code of Laws of South Carolina (1962) 2, 9, 10

Other:

21 Am. Jur. (2d) Criminal Law § 333 (1965) 11

21 Am. Jur. (2d) Criminal Law § 343 (1965) 10

21 Am. Jur. (2d) Criminal Law § 344 (1965) 11

22 C. J. S. Criminal Law § 893 (1961) 11

23 C. J. S. Criminal Law § 1009 (1961) 11

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-97

JAMES HIRAM FIELDS, JR., PETITIONER,

versus

THE STATE OF SOUTH CAROLINA, RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of the State of South Carolina is reported at 214 S. E. (2d) 320 (S. C. 1975), and is set out in Appendix of Petition.

JURISDICTION

Respondents do not question the Court's jurisdiction in this proceeding.

QUESTIONS PRESENTED

I

Did the Supreme Court of South Carolina err in holding that the trial judge did not abuse his discretion, to the effect that Petitioner was denied the assistance of counsel and due process of law, in refusing Petitioner's motion for a continuance?

II

When, pursuant to the provisions of Section 26-301 *et seq.* of the Code of Laws of South Carolina (1962), an out-of-state witness has been made available and cross-examined at trial, is a defendant denied his right of confrontation either by the trial court's failure to order the witness, who has been excused without objection, to reappear or by its failure to receive in evidence said witness' testimony at a former trial?

STATEMENT

Petitioner James Hiram Fields, Jr. is seeking a Writ of Certiorari to review the opinion of the Supreme Court of South Carolina entered on April 16, 1975, affirming his conviction of murder by a jury and corresponding sentence to life imprisonment by the Court of General Sessions of York County, South Carolina.

Petitioner was tried at the March, 1974, term of said court for the murder of Marjorie Marie Hampton. The trial was commenced on March 12, 1974, and concluded on March 14, 1974. Petitioner was found guilty as charged and was sentenced to life in prison.

Frank Patton Cooke of Gastonia, North Carolina, and Keith A. Gatlin of Hayes, Brunson and Gatlin, Rock Hill, South Carolina, were counsel for Petitioner.

Petitioner's case had been first called for trial on January 10, 1974; however, upon his motion for a continuance it was postponed until February 5, 1974. Trial

was commenced at the February, 1974, term of court, but after a day and a half of trial Petitioner's motion for a mistrial was granted. The case was then set for March 11, 1974, by special order of the court.

Mr. Gatlin's March 4, 1974, motion for a continuance on Petitioner's behalf was denied. Upon the call of the case for trial on March 11, 1974, a motion for a continuance was made by Mr. Gatlin upon the ground that Mr. Cooke, characterized by the former as chief counsel in the case, was engaged in the trial of another case in Lincolnton, North Carolina. The motion was denied; however, by agreement of counsel the case was continued until March 12, 1974, whereupon Mr. Gatlin again moved for a continuance on the same ground. The motion was denied, and Petitioner's trial was commenced. Mr. Cooke arrived the following morning.

A Dr. Rutland, a pathologist from Gastonia, North Carolina, who had testified at the February proceeding which had ended in a mistrial, also testified at the instant trial. After considerable difficulty in securing his appearance, Dr. Rutland was present in court for two days and was cross-examined on three occasions by Mr. Gatlin, who thereafter consented to excusing the witness. At the conclusion of Petitioner's case, Mr. Cooke moved the court to issue an order for Dr. Rutland to reappear. After a considerable delay during which efforts were made to secure his reappearance, the trial resumed. Mr. Cooke's motion to admit in evidence Dr. Rutland's testimony at the previous trial was denied.

As indicated hereinabove, the trial culminated in Petitioner's conviction of murder and sentence to life imprisonment, which was affirmed by the South Carolina Supreme Court. It is from the State Supreme Court's opinion that Petitioner seeks this Writ of Certiorari.

ARGUMENT

I

The Supreme Court of South Carolina did not err in holding that the trial judge did not abuse his discretion, to the effect that Petitioner was denied the assistance of counsel and due process of law, in refusing Petitioner's motion for a continuance.

A motion for a continuance, to include one bottomed upon the absence of counsel, is addressed to the sound discretion of the trial judge whose decision will not be disturbed on appeal absent a showing of abuse of discretion and of arbitrariness violative of due process of law. *Ungar v. Sarafite,* 376 U. S. 275, 84 S. Ct. 841, 11 L. Ed. (2d) 921 (1964). Because of this nature of the disposition of a request for a continuance, it has been said that such decisions will not ordinarily be reviewed. *Avery v. Alabama,* 308 U. S. 444, 60 S. Ct. 321, 84 L. Ed. 377 (1940). It is respectfully submitted that a Writ of Certiorari should not issue in this instance, for Petitioner has not demonstrated that he will be able to sustain his burden of proving the requisite arbitrariness and abuse of discretion.

No set and definite rules can be laid down governing continuances; rather, each motion for a continuance must necessarily depend upon all the surrounding circumstances, in light of which it is for the trial judge to determine if justice demands or warrants such. *Ungar v. Sarafite, supra.* A review of the surrounding circumstances herein made available to the trial judge reveals a proper exercise of discretion in refusing Petitioner's motion for a continuance.

The homicide for which Petitioner was indicted occurred on July 5, 1973 (T. R., p. 1, f. 1). Frank Patton Cooke of Gastonia, North Carolina, and Keith A. Gatlin of Hayes, Brunson and Gatlin, Rock Hill, South Carolina,

were counsel for Petitioner (T. R., p. 1, f. 2). A preliminary hearing was held, at which Mr. Gatlin was present (T. R., p. 12, f. 46).

Petitioner's case was first called for trial on the morning of Thursday, January 10, 1974. A four-day trial, in the course of which some thirty witnesses would be heard, was anticipated by counsel for both sides (T. R., p. 3, f. 10; p. 4, f. 14; p. 7, f. 25; p. 12, f. 45). Primarily upon Mr. Cooke's assertion that "this case can [not] be tried without going Saturday and Sunday," (T. R., p. 3, f. 10) Petitioner's motion for a continuance was granted (T. R., p. 5, f. 19).

Trial of Petitioner was commenced at the February, 1974, term of court, and after a day and a half of trial, during which only three or four of the State's witnesses had testified, Petitioner's motion for a mistrial was granted (T. R., p. 1, f. 2; p. 11, f. 44). The case was subsequently set for Monday, March 11, 1974, by special order of the court (T. R., p. 1, f. 2).

On March 5, 1974, Petitioner moved that his case be continued from March 11 until the next term of court upon the ground that his daughter and granddaughters had been involved in an accident. This motion was denied, and Petitioner was informed by the trial judge that the same would be called as previously scheduled (T. R., p. 6, f. 22).

Petitioner's case was then called for trial on March 11, 1974, and Mr. Gatlin again moved for a continuance on Petitioner's behalf upon the ground that Mr. Cooke, characterized by Mr. Gatlin as chief counsel in the case, was engaged in the trial of another case in North Carolina. This motion was denied; however, by agreement of counsel the case was continued until Tuesday, March 12, 1974 (T. R., p. 1, f. 3).

On March 12 Petitioner's cast was again called for trial, and Mr. Gatlin again moved for a continuance based upon Mr. Cooke's absence. This motion was denied, and Petitioner's trial was commenced (T. R., p. 1, f. 4). Mr. Cooke arrived the following morning.

While in a proper case the Supreme Court of South Carolina has not been opposed to reversing a trial judge's denial of a motion for a continuance in a criminal case premised upon the absence of counsel, *see State v. Spencer,* 177 S. C. 346, 181 S. E. 217 (1935), its decision herein was in harmony with its precedents, with the decisions of the courts of other states, with federal court decisions, and with the decisions of this Court.

The defendant in *State v. Edwards,* 86 S. C. 215, 68 S. E. 524 (1910), represented by two attorneys, had been granted a continuance at a previous term of court. When the case was called for trial at the next term, one of the attorneys moved for a continuance upon the ground of the absence of the other, whose illness was confirmed by a physician's certificate, and upon the further ground that the former "did not feel fully warranted to proceed with the trial." No abuse of discretion was found in the trial judge's denial of said motion. *See also State v. Smoak,* 142 S. C. 37, 140 S. E. 251 (1927), and *State v. Hunter,* 79 S. C. 84, 60 S. E. 241 (1908), wherein there was no abuse of discretion in refusing a continuance based upon the absence of **chief** or **leading** counsel, and *State v. Peters,* 255 S. C. 375, 179 S. E. (2d) 19 (1971).

Noble v. State, 497 P. (2d) 452 (Okla. Cr. 1972), is so precisely in point that the language of the court therein warrants quoting:

> Defendant next contends that the trial court abused it's (sic) discretion in denying his motion for continuance. The motion for continuance contained in the records seeks postponement of trial so that an attorney

> from Texas could be present and actively participate during the presentation of evidence to the jury. Careful reading of the motion for continuance reveals that the Oklahoma attorney, who represented defendant at trial, quoting the motion itself, "has been handling all matters concerning this Defendant with the advice consent and assistance of the attorney from the state of Texas."
>
> . . .
>
> This Court held in *Woodruff v. State,* 56 Okl. Cr. 409, 41 P. (2d) 129 (1935), and in other cases too numerous to enumerate, that an application for continuance on the ground of the absence of leading counsel is properly denied, where defendant is duly represented by his other counsel.

The identical issues raised by this Petitioner were confronted by the Ninth Circuit Court of Appeals in *Majeska v. United States,* 266 F. (2d) 947 (9th Cir. 1959), *cert. denied,* 361 U. S. 843, 80 S. Ct. 95, 4 L. Ed. (2d) 81 (1959). The defendant therein retained one Hanifin to represent him in the District Court. At his arraignment he was represented by one Alkow, an attorney duly admitted to practice in the court, allegedly as an accommodation to Hanifin. On the day set for trial Alkow again appeared and moved for a continuance upon the ground that Hanifin was engaged in a jury trial elsewhere. The former further represented that he knew nothing about the case and had talked to neither witnesses nor the defendant. A jury was drawn, but the trial was postponed until the following day, whereupon Alkow appeared and again represented that Hanifin was still engaged in another trial. The trial court refused to further continue the case, and the Court of Appeals found no abuse of discretion, noting that the motions had not been made until the day set for trial and that a one-day postponement had been allowed during which arrangements for the defense

could have been made. It should be noted that the identical factors obtained in the instant case.

Petitioner relies primarily upon *Giacalone v. Lucas,* 445 F. (2d) 1238 (6th Cir. 1971); however, application of the factors enumerated therein reveals no arbitrariness violative of due process or abuse of discretion on the part of the trial court and the South Carolina Supreme Court. Inasmuch as a four-day trial was anticipated by all concerned (T. R., p. 3, f. 10; p. 12, f. 45), to have granted Petitioner's motion made on Tuesday, March 12, 1974, would have, in effect, continued the case until the next term of court or have run it into the weekend, the evil sought to be avoided by the trial judge's grant of Petitioner's first motion for a continuance. Notwithstanding his claim of unpreparedness, it appears that Mr. Gatlin, a competent and experienced criminal lawyer, "ha[d] been in the case from the beginning. He attended the Preliminary Hearing and made the motion for a continuance in January and joined in the motion for the mistrial in February and made the motion last Monday morning for a continuance and yesterday for a continuance and he [was] accompanied by the investigator out of Mr. Cooke's office." (T. R., p. 12, f. 46). In this latter regard it is worthy of note that it was said investigator who "had handled the investigation and trial preparation" (Petition p. 6, lines 29-30). Three other continuances had been requested by Petitioner, the first of which had been granted by the trial court and the last of which had been allowed via agreement of counsel. Finally, numerous witnesses had been subpoenaed on behalf of both the State and the defense, to include in-state and out-of-state lay witnesses, in-state and out-of-state law enforcement officers, and an out-of-state expert witness. Also, five additional jurors had been drawn (T. R., p. 11, f. 44). In light of these factors made available to the trial judge at the time the mo-

tion was denied, it is respectfully submitted that the conclusion of this Court in *Ungar v. Sarafite, supra,* is equally applicable to the case at hand:

> Given the deference necessarily due a state trial judge in regard to the denial or granting of continuances, we cannot say these denials denied Ungar due process of law. 376 U. S. at 591.

II

When, pursuant to the provisions of Section 26-301 et seq. of the Code of Laws of South Carolina (1962), an out-of-state witness has been made available and cross-examined at trial, a defendant is not denied his right of confrontation either by the trial court's failure to order the witness, who has been excused without objection, to reappear or by its failure to receive in evidence said witness' testimony at a former trial.

The relationship of the question here posed to Question I is obvious, as was recognized by the trial judge (T. R., p. 231, f. 922), and Respondent submits it is equally without merit. When, pursuant to the provisions of Section 26-301 *et seq.** of the Code of Laws of South Carolina (1962), entitled "Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings," a trial judge of this state issues a certificate to the effect that an out-of-state witness is a material witness in a criminal prosecution pending herein, a judge where

* South Carolina Code § 26-307 provides: "If a person in any state which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions or grand jury investigations commenced or about to commence in this State is a material witness in a prosecution pending in a court of record in this State or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. Such certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this State to assure his attendance in this State. The certificate shall be presented to a judge of a court of record in the county in which the witness is found."

the witness is found issues a summons directing said witness to attend and testify, and the witness attends and testifies, it is difficult for Respondent to conceive how a defendant can claim he has been denied his right of confrontation.

In *People v. Pickett,* 339 Mich. 294, 63 N. W. (2d) 681 (1954), it was held that the constitutional right of confrontation is satisfied if an accused has been once confronted by the witnesses against him at any stage of the proceedings on the same accusation and has had the opportunity to cross-examine by himself or counsel in his behalf. *See also* 21 Am. Jur. (2d) *Criminal Law* § 343 (1965). Inasmuch as Petitioner was confronted by Dr. Rutland, a North Carolina pathologist and the witness in question, who was subjected to cross, re-cross, and yet re-cross examinations, certainly it can be said that he was afforded his right of confrontation.

Although he indicated a willingness "to do all I can to get [Dr. Rutland] here," to include "delay[ing] the matter a reasonable length of time," (T. R., p. 288, f. 911) it should be noted that the trial judge was never requested to again employ the provisions of Section 26-301 *et seq.;* rather, he was asked, and error is assigned to his refusal, to issue an order for Dr. Rutland to reappear (T. R., p. 244, f. 893). In this regard the South Carolina Supreme Court's language in *State v. Murphy,* 48 S. C. 1, 25 S. E. 43 (1896), is appropriately quoted:

> But there is no authority for the issuance of compulsory process for a witness out of the jurisdiction of the courts of this state. Such a writ would be wholly nugatory beyond the limits of the state and, of course, could be ignored and disobeyed by all persons with impunity. There was no error, therefore, in refusing to attempt such a thing.

See also State v. Rasor, 168 S. C. 221, 167 S. E. 396 (1933).

The right of confrontation is a personal privilege which may be waived by express consent, by failure to assert the right in time, or by conduct inconsistent with a purpose to insist on it. *See Illinois v. Allen,* 397 U. S. 337, 90 S. Ct. 1057, 25 L. Ed. (2d) 353 (1973); 21 Am. Jur. (2d) *Criminal Law* § 344 (1965); 23 C. J. S. *Criminal Law* § 1009 (1961). Because Petitioner consented to the excusing of Dr. Rutland so as to allow him to return to his residence without the jurisdiction of the court (T. R., p. 89, f. 356—p. 90, f. 357), it is respectfully submitted that he waived his right to further confront him.

The confrontation requirement has two purposes. The main one is to secure the opportunity for cross-examination. The secondary purpose is the advantage to be obtained from the personal appearance of the witness to the end that the jury is enabled to obtain the elusive and incommunicable evidence of the witness' deportment while testifying. *Barber v. Page,* 390 U. S. 719, 88 S. Ct. 1318, 20 L. Ed (2d) 255 (1968); 21 Am. Jur. (2d) *Criminal Law* § 333 (1965). While it is true that this secondary purpose is sometimes outweighed by the necessity for a witness' testimony so that testimony given at a former trial is admissible where under certain circumstances the witness is unavailable, *see Mancusi v. Stubbs,* 408 U. S. 204, 92 S. Ct. 2308; 33 L. Ed. (2d) 292 (1972), this exception has no application where the witness is available and does, in fact, testify. *Piassick v. United States,* 253 F. (2d) 658 (5th Cir. 1958). In such cases the secondary purpose of the confrontation requirement is not outweighed by the necessity for the witness' testimony.

Finally, it has been held that the admissibility of testimony given at a former trial is addressed to the sound discretion of the court. 22 C. J. S., *Criminal Law* § 893 (1961). Inasmuch as Dr. Rutland was present in court for two days and was cross-examined on three occasions by

defense counsel, Respondent submits that Petitioner has not demonstrated the requisite abuse of discretion in the tral judge's refusal to receive in evidence Dr. Rutland's testimony at the former trial.

CONCLUSION

For all of the foregoing reasons it is respectfully submitted that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

DANIEL R. McLEOD,
Attorney General,

C. TOLBERT GOOLSBY, JR.,
Deputy Attorney General,

SIDNEY S. RIGGS, III,
Assistant Attorney General,
Attorneys for Respondent.